

Waiting for the Air to Clear: Workplace Cannabis Policies

By Ursula H. Leo and
Timothy J. Profeta

While we wait for the air to clear around New Jersey’s Cannabis Regulatory Commission’s (CRC) standards for its new Workplace Impairment Recognition Expert (WIRE) certificate, employers need clarity regarding workplace cannabis policies and procedures. This article addresses ambiguities surrounding WIRE certification, procedures regarding adverse employment actions in relation to cannabis, and the potential workplace implications of appointing or contracting a WIRE.

It is presently unclear what standards a WIRE must meet to be certified by the CRC, whether a certified WIRE must maintain credentials by continuing education, or whether a WIRE will have to meet certain prerequisites before applying for certification. Further, because CRC guidelines are not intended to supplant existing workplace policies, it is unclear what, if any, presumptions will be afforded to determinations made by a WIRE as distinct from a determination by management or human resources, if an employee contests a determination of workplace impairment.

Reasonable Suspicion Standard and WIRE

The CRC currently advises that the best practice for employers is to use



Cannabis. Credit: hanohiki/Adobe Stock

evidence-based protocols to document physical and behavioral indicators of impairment to establish reasonable suspicion that an employee is under the influence of cannabis in the workplace. “Reasonable suspicion,” in the criminal procedure context, means that a person “must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant [an investigation].” The Supreme Court elaborated that reasonable suspicion requires less than proof by a preponderance of evidence, but more than an “inchoate or unparticularized suspicion or hunch.”

Once an employer establishes reasonable suspicion, an employer may then conduct a drug test to determine if a person has recently used an intoxicating substance. While it

is an open question as to how much discretion the CRC will recommend a WIRE will have, it is highly likely that a WIRE will be the point person in determining and assessing probable cause. As of now, at least two higher-level employees should document their observations or reasonably suspicious behavior. Whether the CRC will recommend a rigid evidentiary standard or a deferential evidentiary standard for reasonable suspicion arising under a WIRE is also an open question. That said, and this should be clear for all topics discussed throughout: all CRC recommendations are exactly that—recommendations. Management may set higher standards for reasonable suspicion than the law requires or higher standards than the CRC recommends. However, employers should not set

lower standards for reasonable suspicion than the CRC recommends. For the time being, employers may assume the legal standard for reasonable suspicion is sufficient for requiring a drug test.

If there is no reasonable suspicion, however, an employer cannot simply test for the presence of cannabinoids in an employee's system, and then take an adverse employment action for a positive test. Rather, as stated, there must be an evidentiary basis for suspecting an employee was under the influence at their place of work, before an employer can require they submit to a drug test as a condition of employment. As always, documentation is key to support any such determination.

WIRE and Management

It is likely that a designated WIRE will have to work with management regarding what standards are to be put in place for determining reasonable suspicion, handling complaints, and/or methods of gathering information. HR employees and departments in small companies are already overwhelmed by the many hats they are required to wear. To the duties of payroll, investigations, health benefits, and employee leave, to name just a few, HR directors may now be asked to also add cannabis impairment recognition. The lodestar in determining cannabis impairment standards should be honestly applied discretion, checked by clear, easily applied standards. As with any position of authority, there comes the possibility for abuse. That is why

management in any company would be wise to set firm standards pursuant to which a WIRE may act, while also allowing enough discretion for a WIRE to determine the appropriateness of acting.

On the practical side, implementing a WIRE in various workplaces may require delicate handling. Change is always hard, and for some employees, having a new authority in the workplace with the power to require drug tests may pose concerns. If there is an undercurrent of implicit bias in the workplace, that will grow with the introduction of a WIRE. This underscores the need for transparent and clear standards, some of which are already available. For example, the CRC provides a uniform reasonable suspicion observation form, which may be adopted. That form documents behavior, physical signs, and other evidence that may inform a WIRE's determination of reasonable suspicion that an employee is under the influence in the workplace. While this form is not cannabis specific, it is a good place to start. Likewise, the CRC may also recommend a WIRE use a cognitive impairment test, which is a scientifically objective and consistently repeatable measure of an employee's potential impairment. Alternatively, management may permit an ocular scan and/or observation of physical indicators of cannabis use. Again, these decisions should be clear, transparent, and communicated well before formal implementation of these procedures.

Given the alternate avenues management may take for setting guidelines, it will be critical that the CRC issue

guidance on how WIREs are certified, and whether WIREs will be certified in one form of impairment recognition as opposed to another, or whether they will require certification in all types of impairment recognition. We can look to the police to see how impairment has been identified and proven. Various methods are currently under review by the New Jersey Supreme Court in *State of New Jersey v. Olenowski*. The Supreme Court in that case designated a special master to provide factual determinations and legal analyses regarding the admissibility of a drug recognition expert in the criminal context. The special master reviewed various types of methods and procedures for determining impairment, and concluded that drug recognition expert testimony is reliable. The Supreme Court may or may not adopt that conclusion. Either way, the court's conclusion will almost certainly inform the CRC's guidance on WIREs. At the moment, there are many moving parts in the air, leaving many open questions. Once the air clears, and we have guidance from the Supreme Court and the CRC, management will be able to begin the process of standardizing and implementing workplace impairment policies.

Ursula H. Leo is the practice leader of the employment and labor law practice at *Laddey Clark & Ryan*, based in Sparta.

Timothy J. Profeta is an associate in the firm's employment and labor law practice.